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In the Supreme Court of the United States

OCTOBER TERM, 1977

EDWARD FLYNN, et al.,

Petitioners,

vs.

HARRIET BAUMAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEFFREY M. LERNER
120 W. Madison Street
Chicago, Illinois 60602
Attorney for Respondent

CARL P. CLAVELLI
JONATHAN E. SHIMBERG
on the Brief.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-0581

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The Respondent, Harriet Bauman, respectfully prays that the petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on December 2, 1977, be denied. (Pet. App. B)

JURISDICTION AND STATUTES INVOLVED

Petitioners adequately set forth the jurisdiction of this Court and each of the statutes pertinent to the question presented.

STATEMENT OF THE CASE

The Petitioners' statement of the case is substantially correct.

QUESTIONS PRESENTED

Whether Illinois' general statute of limitations for "civil actions not otherwise provided for", should be applied in federal civil rights actions when there is no specific statute governing civil rights' limitations periods, instead of the Illinois statute controlling the limitations period for injuries to the person.

REASONS FOR DENYING THE WRIT

The Decision of the Seventh Circuit to Apply Illinois General Limitations Statute for "Civil Actions Not Otherwise Provided For" Instead of Illinois Limitations Statute for Personal Injuries Was Correct in View of the Inherent Differences Between A Deprivation of An Individual's Civil Rights and an Injury Compensable Under Common Law Tort Theories.

Whenever a federal statute does not contain a limitations period, the closest analogous state statute governs the action. *O'Sullivan* v. *Felix,* 233 U.S. 318 (1918). Accordingly, the controlling period of limitations in a federal civil rights action is derived from the law of the forum state. *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 462-464 (1975). Since Illinois has not enacted a specific limitations statute for civil rights actions, federal courts must determine which of Illinois' limitations statutes is most closely related to the type of injury alleged in a civil rights complaint.[1]

A cause of action under the Civil Rights Act, 42 U.S.C. § 1983, arises only when the alleged violations of an individual's constitutional rights are performed by one acting under color of law; this prerequisite serves to distinguish the wrongful conduct from traditional common law actions to recover for personal injuries. Just as the inchoate offense of conspiracy is distinguishable from the substan-

[1] Thus, the decision of the Seventh Circuit that Illinois' general five year statute should be employed in civil rights actions can be mooted by the passage of a specific statute by the Illinois legislature should a different period of limitations be desired.

tive offense only by the collective agreement and, thereby, is considered a greater potential threat (*Iannelli* v. *United States,* 420 U.S. 770, 778-9 (1975)), personal injuries actionable under section 1983 of the Civil Rights Act are distinguishable from their common law counterparts by the official status of the tortfeasor and, thereby, pose a greater threat to public order (*Monroe* v. *Pape,* 365 U.S. 167, 173-4, 180 (1961)).

Justice Harlan noted that the enacting Congress would not have passed such a broad measure if it had not "regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern." *Monroe* v. *Pape,* 365 U.S. 167, 193, 196 (1961) (concurring opinion).

Suits seeking damages caused by a conspiratorial agreement do not rely upon the underlying conduct as the basis of the action. The gist of the action is the manner by which the plaintiff was harmed and not the *type* of harm suffered. Due to the aggravating circumstances present when an injury is inflicted pursuant to an unlawful compact, Illinois affords the injured party the extended period of limitations provided for in Section 16 by classifying the action as one not provided for by a specific limitations statute. *Brietenberger* v. *Schmidt,* 38 Ill.App. 168, 177 (3d Dist. 1890). Civil Rights Actions do not depend upon the nature of the underlying conduct either. The gist of the action is the manner in which the complainant was deprived of constitutional rights—by one acting under color of state law.

The Seventh Circuit recognized the difference between civil rights actions and actions alleging personal injuries as early as 1958 in *Wakat* v. *Harlib,* 253 F.2d 59, 63-64 (7th Cir. 1958). There, the Court rejected the defendant police

officers' claim that a complaint alleging violations of the plaintiff's civil rights under sections 1983 and 1985 was barred by the Illinois two year statute of limitations. As in the instant suit, the plaintiff's allegations against the defendant police officers were categorized in the lower court under the common law torts of assault, false arrest and imprisonment. The issue on review was whether the Court should apply the two year limitations period provided by Illinois law for those torts or the general five year statute for "all civil actions not otherwise provided for."

The Court examined Illinois law pertaining to statutory causes of action and found that Illinois' statute of limitations for personal injuries was not analogous to the statutorily created right of action for civil rights violations. Since the Civil Rights Act created a statutory federal cause of action over and above the traditional state remedies known at common law, the Court in *Wakat* concluded that causes of action based upon Sections 1983 and 1985 were not governed by Section 14 of the Illinois Limitations Act of 1871 (Ill.Rev.Stat. ch. 83, sec. 15), but were properly included within section 15 (Ill.Rev.Stat. ch. 83, sec. 16) as "civil actions not otherwise provided for." Accord, *Inada* v. *Sullivan,* 523 F.2d 485, 488 (7th Cir. 1975); *Duncan* v. *Nelson,* 466 F.2d 939 (7th Cir. 1972), cert. den. 409 U.S. 894; *Rinehart* v. *Locke,* 454 F.2d 313 (7th Cir. 1971); *Weber* v. *Consumers Digest, Inc.,* 440 F.2d 729, 731 (7th Cir. 1971); *Waters* v. *Wisconsin Steel Works,* 427 F.2d 476, 488 (7th Cir. 1970) cert. den. 400 U.S. 911; *Baker* v. *F & F Investment,* 420 F.2d 1191, 1197-8 (7th Cir. 1970), cert. den. 420 U.S. 821; See also, *Alliance to End Repression* v. *Rochford,* 407 F.Supp. 115, 120 (N.D. Ill. 1975); *Amen* v. *Crimmins,* 379 F.Supp. 777, 779 (N.D. Ill. 1974); *Holmes* v. *Silver Cross Hospital,* 340 F.Supp. 125, 128 (N.D. Ill. 1972).

Recently, in *Beard* v. *Robinson,* 563 F.2d 331, 336-337 (7th Cir. 1977), cert. pend'g, ... U.S. ....., the Seventh Circuit reiterated its reasons for not adopting the limitations period applicable to personal injuries. The Court's decision was predicated on the "fundamental differences" between traditional torts and those injuries not known at the common law but redressable under the Civil Rights Acts which

> "creat[e] rights and impos[e] obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability." *Smith* v. *Cremins,* 308 F.2d 187, 190 (9th Cir. 1962) (footnote and citations omitted).

As Justice Harlan noted in *Monroe* v. *Pape,* 365 U.S. 167, 196 (1961) (concurring opinion):

> "a deprivation of a constitutional right is significantly different and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."

He went on to foretell:

> "There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. * * * It would indeed be the purest coincidence if the state remedies for *violations of common-law rights by private citizens* were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection."

365 U.S. at 196 n. 5. (Emphasis added)

A cause of action for a deprivation of a constitutional right by one acting under color of state law is a statutory cause of action created to remedy the many inadequacies of local law. *McNeese* v. *Board of Education,* 373 U.S. 668, 671-2 (1963). This suit has been properly categorized as a civil action "not otherwise provided for" under current Illinois law because it does not allege the type of personal injuries recognized under the common law. The allegations in a civil rights action do not allege the type of injuries which can be caused by private individuals but state a cause of action of constitutional dimensions for the wrongful conduct of state officers done under color of state law. This is a statutorily created right of action not fully remedied by traditional common law actions and is properly governed by Illinois' general five year statute of limitations.

CONCLUSION

It is respectfully submitted that the petitioners have failed to demonstrate special and important reasons for the issuance of the Writ. The decision of the Seventh Circuit to apply Illinois' general limitations statute to civil rights actions is wholly consistent with prior decisions of this Court. For the above and foregoing reasons, the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

JEFFREY M. LERNER
Attorney for Respondent

CARL P. CLAVELLI
JONATHAN E. SHIMBERG
On the Brief